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No. 787

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In the

Supreme Court of the United States

October Term, 1962

INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, INC.
and
JOHN W. BRUMMETT
and
FARM BUREAU COOPERATIVE ASSOC., INC.,
Petitioners,

vs.

AMERICAN FIDELITY & CASUALTY CO., INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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In the

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No. ———

INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, INC.
and
JOHN W. BRUMMETT
and
FARM BUREAU COOPERATIVE ASSOC., INC.,
Petitioners,

vs.

AMERICAN FIDELITY & CASUALTY CO., INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit dated October 10, 1962.

OPINIONS BELOW

This declaratory judgment action was tried before the United States District Court upon a stipulation of facts and depositions. The District Court opinion is reported

officially at 195 F. Supp. 648. The opinion of the Court of Appeals is printed in Appendix A, *infra*, and is reported officially at 308 F. 2d 697.

JURISDICTION

The judgment of the Court of Appeals was entered on October 10, 1962. A petition for rehearing was timely filed and was denied on November 8, 1962. On January 3, 1963 this Court granted petitioner an extension of time until February 7, 1963 for the filing of its petition for writ of certiorari. Petitioner invokes the jurisdiction of this Court under Section 1254 (1) of the Judicial Code, 28 U. S. C. Sec. 1254 (1). Jurisdiction of the federal courts is based on diversity of citizenship and an amount in suit in excess of $10,000.

QUESTIONS PRESENTED

(I) Whether there is a conflict of authority in the various United States Courts of Appeals with respect to the meaning and scope of employee exclusion clauses in automobile liability insurance policies.

(II) Whether the automobile liability insurance policy, issued by American Fidelity & Casualty Co. to the Stillpass Transit Co., extends coverage to Farm Bureau Cooperative, for injuries to Carl Candler, an employee of Stillpass Transit Co., occurring on the Farm Bureau premises and because of the Farm Bureau's alleged negligence.

(III) Whether the United States District and Appellate Courts, under the doctrine of *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, are obliged to follow a decision of an Ohio Court of Appeals, having statewide jurisdiction.

STATEMENT OF THE CASE

This case involves a declaratory judgment action in which the respondent, American Fidelity & Casualty Co. (hereinafter referred to as American) has asked the Court to determine whether the automobile liability insurance policy issued by American to Stillpass Transit Co. extended coverage to an employee of the Farm Bureau Cooperative. Both the District Court and the Court of Appeals held that the policy did not extend coverage to Farm Bureau or its employee.

The petitioners (defendants-appellants below) are Farm Bureau Cooperative Association, Inc., (hereinafter referred to as Farm Bureau), its employee John Brummett, and the Indemnity Insurance Company of North America (hereinafter referred to as Indemnity), who had issued a general liability insurance policy to Farm Bureau Cooperative.

The facts may be briefly stated as follows:

On January 29, 1962, Carl Candler, an employee of Stillpass Transit Co., drove a tractor-tank-trailer containing sulphuric acid from Hamilton, Ohio to the premises of Farm Bureau in Dayton, Ohio. While John W. Brummett, a Farm Bureau employee, was unloading the sulphuric acid from the tank-trailer by application of compressed air, a hatch door opened and sulphuric acid was thrown upon Candler, severely injuring him.

As a result of the accident, Carl Candler received workmen's compensation benefits from the State of Ohio, as an employee of Stillpass Transit Company.

Carl Candler's injuries herein were substantial and he subsequently filed a suit against Farm Bureau in the Common Pleas Court of Montgomery County, Ohio.

This declaratory judgment action was brought to determine whether American had any responsibility with respect to the defense of this suit.

At the time of the accident to Candler, Stillpass Transit Co. and its employees were insured under an Automobile Liability Insurance Policy by which American was obligated "to pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury . . . sustained by any person, caused by accident and arising out of the ownership, maintenance or use of the automobile." Use of the automobile by the terms of the policy includes the loading and unloading thereof.

The omnibus clause of the policy further provides:

> "III . . . With respect to the insurance for bodily injury liability . . . the unqualified word insured includes the named insured and also includes any person while using the automobile . . . provided the actual use of the automobile is by the named insured or with his permission . . ."

Farm Bureau and its employees are thus covered under the policy as additional insured because they were unloading the tank-trailer (a recognized use) with the permission of Stillpass Transit.

American, however, contends that, although Farm Bureau and its employee, John Brummett, are covered under the omnibus clause of the policy, there is no liability to Candler because of the following exclusion clauses:

> III. This policy does not apply:
>
> (d) . . . to bodily injury to . . . any employee of the insured while engaged in the employment . . . of the insured.
>
> (e) . . . to any obligation for which the insured or any company as his insurer may be held liable under any workmen's compensation law; . . .

American reasons that Candler was an "employee of the insured while engaged in the employment . . . of the insured" and that Stillpass Transit was liable to him under Workmen's Compensation laws; therefore, the exclusion applies.

The petitioners believe that such reasoning oversimplifies the problem and fails to recognize a latent ambiguity in the exclusion clause, which is the fact that the phrase "the insured" includes both the named insured and any additional insured. Thus, it is unclear whether the exclusion applies where one is an employee of the named insured, but not an employee of the additional insured whom he is suing.

The petitioners contend that the exclusion provisions are not applicable because Candler, although an employee of the named insured, Stillpass Transit, is not an employee of the insured being sued, Farm Bureau and John Brummett, who are additional insured.

REASONS FOR GRANTING THE WRIT

I.

The decision of the Court of Appeals below is in conflict with the decisions of the Third and Ninth Circuit Courts of Appeals as to the meaning and scope of liability insurance exclusionary clauses relating to injuries to employees.

The Courts of Appeals are in irreconcilable conflict on the question of whether coverage is afforded to an additional insured with respect to claims for personal injuries asserted against such additional insured by an employee of the named insured.

One line of authority holds that the obligations of the insurer to the named insured and the additional insured should be treated separately and the exclusion provision treated as if a separate policy had been issued to the person invoking its coverage.[1]

Ginder v. *Harleysville Mutual Casualty Co.*, 135 F. 2d 215 (C. A. 3d), affirming 49 F. Supp. 745 (D.C. E.D. Pa.).

Kaiser v. *Georgia Casualty Co.*, 67 F. 2d 309 (C. A. 9th).

In applying this rule to the instant case, Candler was an employee of neither Farm Bureau nor John Brummett (the additional insured); therefore, the exclusion provisions would have no application and American's policy would cover them. The only Ohio cases are included in this line of authority.

Employers Liability Assurance Co. v. *Liberty Mutual Insurance Co.*, 167 N. E. 2d 142 (Ct. Com. Pleas, Columbiana Cty.)

Travelers Insurance Co. v. *Buckeye Union Casualty Co.*, 81 Ohio L. Abs. 108 (Ct. Com. Pleas, Franklin Cty.),[2] aff'd 112 Ohio App. 386; aff'd 172 Ohio St. 507.

American Automobile Insurance Co. v. *Motorists Mutual Insurance Co.*, decided June 13, 1960 (Ct. Com. Pleas, Cuyahoga Cty.); affirmed July 27, 1961 (Ct. of App., Cuyahoga Cty.); motion to certify record denied, 34 Ohio Bar 23. Appendix D, *infra*.

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[1] For a review of all of the cases both federal and state, see *Kelly* v. *State Automobile Insurance Assn.*, 288 F. 2d 734 (C. A. 6th).

[2] The *Travelers* case was affirmed by both the Court of Appeals and the Supreme Court of Ohio; however, this issue was abandoned on appeal.

On the other hand there is an equally impressive line of authority that the policy does not cover an additional insured when sued by an employee of the named insured.

Lumber Mutual Casualty Co. of N. Y. v. *Stukes*, 164 F. 2d 571 (C. A. 4th).

Johnson v. *Aetna Casualty & Surety Co.*, 104 F. 2d 22 (C. A. 5th)

American Fidelity & Casualty Insurance Co. v. *St. Paul-Mercury Indemnity Co.*, 248 F. 2d 509 (C. A. 5th).

Travelers Insurance Co. v. *Ohio Farmers Indemnity Co.*, 262 F. 2d 132 (C. A. 6th).

Kelly v. *State Automobile Insurance Assn.*, 288 F. 2d 734 (C. A. 6th).

Thus, we have two distinct lines of cases considering the same exclusion clause and arriving at diametrically-opposed results, a clear conflict that should be resolved by this Court. As a matter of fact one line of cases finds "no ambiguity in the exclusion clauses." *Kelly* v. *State Automobile Insurance Assn.*, *supra*, page 737; while the other line of cases finds the exclusion clause, or more particularly the phrase "employee of the insured," to be ambiguous. *New* v. *General Casualty Co.*, 133 F. Supp. 955 (M. D. Tenn.)

The obvious response to the allegation of the existence of a conflict of authority is the fact that the federal court must look to the laws of the States in arriving at their decisions. A review of the cases cited, however, will show that there were no authoritative State decisions in these cases and the Courts of Appeals adopted what they believed was the sound and better rule. Unfortunately, three courts chose one rule and two chose the other.

The importance of obtaining an authoritative decision on this issue can not be minimized, since accidents occur

daily in the business world giving rise to the problem and there is no reason why citizens of different parts of the country should not be able to receive identical treatment in the federal courts when these courts are applying not state law but "the sound and better rule."

II.

The automobile liability insurance policy issued by American Fidelity to Stillpass Transit Co. extends liability coverage to Farm Bureau and its employees for injuries negligently caused by them to Carl Candler.

Petitioners believe that the exclusion clause withdraws coverage only when a claim or suit is by an employee against *his* employer. It is designed to prevent employees from suing their employers after collecting workmen's compensation from their employer's account or as stated in *American Automobile Insurance Co.* v. *Motorist Mutual Insurance Co.*, decided June 13, 1960 (Com. Pleas Ct. of Cuyahoga Cty.), aff'd July 27, 1961 (Ct. of App., Cuyahoga Cty.), certiorari denied, 34 Ohio Bar 23.

> "... The purpose is to prevent coverage under the policy from duplicating coverage which the insured as an employer might otherwise have pursuant to employer's liability or workmen's compensation laws."

On the other hand, American ignores the basic purpose of the exclusion clause and would have its provisions apply whenever any employee of an insured sues either his employer or any other omnibus insured.

Under American's argument, the fact that Candler is an employee of an insured automatically would create an exclusion, regardless by whom he is employed. If Candler is injured by Stillpass Transit during the course of his

employment, there is no question that American has no coverage. He is an employee of the insured, Stillpass Transit, and has workmen's compensation coverage. But suppose he is injured, as in this case, by the negligence of the "insured" (Farm Bureau) for whom he is not employed. There is no reason for the exclusion to apply since Candler has a common law action against Farm Bureau and its employees and there is no workmen's compensation coverage and no danger of duplication of coverage.

The absurdity of American's argument in favor of an unlimited exclusion is best illustrated if we assume *arguendo* that Mr. Candler's negligence injured John Brummett, the employee of Farm Bureau, which is an omnibus insured under American Fidelity's Policy. There is no question that Brummett would be entitled to workmens compensation for the injury as an employee of Farm Bureau. Let us assume further that Brummett sues Stillpass Transit under the doctrine of "respondeat superior." Under American's argument, its policy would not cover Brummett's claim against Stillpass, since Brummett is "an employee of the insured (Farm Bureau) while engaged in the employment of the insured (Farm Bureau) . . . (and) benefits therefrom are payable under workmen's compensation law." It is evident of course that such a conclusion is ridiculous on its face since Stillpass obviously acquired an insurance policy to cover just such claims by third parties. The answer is that the exclusionary provisions relating to employees of the insured refer to employees of the insured then being sued.

The only decisions in the State of Ohio completely support petitioners' contention that the American Fidelity insurance policy extends coverage to Farm Bureau since these cases hold that the employee exclusion clause with-

draws coverage only when a claim or suit is by an employee against his own employer.

Employers Liability Assurance Co. v. *Liberty Mutual Insurance Co., supra.*

Travelers Insurance Co. v. *Buckeye Union Casualty Co., supra.*

American Automobile Insurance Co. v. *Motorists Mutual Insurance Co., supra*; Appendix D, *infra.*

The fact that the exclusion provisions are ambiguous is also extremely significant, since the Supreme Court of Ohio in *Home Indemnity Company* v. *Plymouth*, 146 Ohio St. 96, held that where exceptions, qualifications or exemptions are introduced into an insurance contract, a general presumption arises to the effect that that which is not clearly excluded in the operation of such contracts is included in the operation thereof.

Less there be any doubt as to the existence of an ambiguity, we refer the Court to the opinion in *Equitable Life Ins. Co.* v. *Gerwick*, 50 Ohio App. 277.281:

> "Where the language of a clause used in an insurance contract is such that Courts of numerous jurisdictions have found it necessary to construe it and in such construction have arrived at conflicting conclusions as to the correct meaning, intent and effect thereof the question whether such clause is ambiguous ceases to be an open one. Policies which are prepared by the insurance company, and which are reasonably open to different interpretations, will be construed most favorable to the insured."

This identical issue has been considered by the Courts in numerous jurisdictions and their opinions have been divided as to whether the exclusion clause limited coverage

For a list of divided authorities see *Kelly* v. *State Automobile Insurance Association*, 288 F. 2d 784 (C. A. 6th) and Argument I, *supra*.

In conclusion, it is submitted that American's insurance policy extends coverage to Farm Bureau and John Brummett.

III.

The United States Court of Appeals below failed to apply the substantive law of the State of Ohio in arriving at its decision as required by the doctrine of ERIF R. Co., v. TOMPKINS, 304 U. S. 64.

The Court below recognized that "the law of the State of Ohio is controlling" and stated further:

> "... if the state's highest court has not declared the applicable law, it is the obligation of the federal court in a diversity case to follow the law as expressed by an intermediate state appellate court, and to do so even if the federal court may think the law as so expressed is unsound in principle or that another rule is preferable, unless it is convinced that the highest court of the state would decide otherwise."

The Ohio cases relative to this type of exclusion clause state clearly that the exclusion clause withdraws coverage only where an employee is suing his own employer.

American Automobile Insurance Co. v. *Motorists Mutual Insurance Co., supra*; see Appendix D, *infra*.

Employers Liability Assurance Co. v. *Liberty Mutual Insurance Co., supra*.

Travelers Insurance Co. v. *Buckeye Union Casualty Co., supra*.

In similar factual situations, involving exclusion clauses identical to the American clauses, these courts have held that an employee of a named insured is not excluded from the benefits of the insurance coverage, exempting the insurance company from liability to insured's employees, where the action is brought against one who qualifies as an additional insured under the terms of the policy and who has no employer-employee relationship with such employee and owes him no duty as to workmen's compensation. Thus, the only cases under Ohio law support the petitioner's position.

The question is whether the Federal Court is obligated to follow these cases. All opinions were rendered in Common Pleas Courts (trial courts). The *American Automobile Insurance Co.*, case, set forth in Appendix D, was affirmed without opinion in the intermediate appellate court of Cuyahoga County. The Courts below refused to accept this affirmance as binding on them since the Court in affirming the *American Automobile* case, "did not approve the opinion of the trial court or adopt its reasoning." The Courts below believed that the affirmance could have been based on the opinion of the trial court or any other reason justifying affirmance.

The short answer is that the Court of Appeals affirmed the trial court, which is certainly persuasive evidence of the correctness of the opinion especially when that opinion, as here, is exhaustive and comprehensive. Further, however, the Sixth Circuit Court of Appeals has in other matters adopted the law of Ohio as developed in this fashion. In *Gettins* v. *The United States Life Insurance Co.*, 221 F. 2d 782 Judge Potter Stewart, speaking for the Court stated:

> "In any event, we think it unnecessary to go beyond the law of Ohio to determine the question here in issue. In our view the controlling answer in this case,

> albeit in a somewhat cryptic form, is to be found in a decision of the Ohio Court of Appeals for Cuyahoga County . . . In that case the state appellate court affirmed a judgment of the Municipal Court of Cleveland against the insurance company. The difficulty lies in the fact that the Court filed no opinion, and both the facts and the law of the case must therefore be gleaned from the dissenting opinion."

The Court then went on to discuss the dissenting opinion in the Court of Appeals since neither the trial court nor the majority of the Court of Appeals wrote an opinion and concluded: (p. 784):

> "Obviously the majority of the Ohio Court of Appeals rejected this reasoning, and the Supreme Court of Ohio refused to review the Court's judgment . . . It must be assumed that the Court of Appeals of Cuyahoga County was familiar with the prior cases decided by the Ohio Supreme Court. Since the Supreme Court has only held that some conditions can be waived and others cannot, we conclude that it has made no decision on the particular question involved in the present case.
>
> . . . the Court of Appeals for Cuyahoga County appears to have supplied a *controlling answer* to the question *here in issue*. That being so we are bound by it, until or unless the Supreme Court of Ohio gives a contrary answer. In these circumstances, it is not for us to exercise our independent judgment, to look to other jurisdictions, or to speculate as to what the Supreme Court of Ohio might some day decide." (Italics added.)

Of the three common pleas court decisions in Ohio (cited *supra*, page 11), one was not appealed; in one this issue was abandoned on appeal, the case itself being affirmed (*Travelers Insurance Co., supra*) and the last one (*American Automobile Insurance Co., supra*) was affirmed

on appeal without opinion, and the Supreme Court denied a motion to certify. Obviously, all of the law in Ohio at this time clearly supports the petitioners' contention that the exclusion clauses are not applicable. Furthermore, these trial court decisions are significant. In *Brown* v. *Moore*, 247 F. 2d 711 (C. A. 3d), the Court said:

> ". . . While a ruling of a Court of Common Pleas of Pennsylvania is not binding on us or the Court below. . . . statements in an opinion of such a court are indicative of what the law of Pennsylvania may be. It is the duty of the Federal Courts where, as here, the State law supplies a rule of decision to ascertain and apply that law even though it has not been expounded by the highest court of the State."

The rule certainly appears to be that where a "goodly number" of trial courts in a state generally and for a considerable period of time have adhered to a common interpretation of state law, federal courts are bound to follow that interpretation.

California v. *Renauld & Co.*, 179 F. 2d 605 (C. A. 9th)

Westerman v. *Gilbert*, 119 F. Supp. 855 (D. C. R. I.).

Even though neither the Supreme Court nor the Courts of Appeals have written an opinion on this issue, nevertheless, the opinions of the trial courts and the action of one court of appeals certainly indicate the trend and weight of the law in Ohio. Such law should not be disregarded unless there is "Persuasive data that the highest court of the State would decide otherwise." *West* v. *American Telephone & Telegraph*, 311 U. S. 223, 237. No such data is present in this case.

CONCLUSION

It is respectfully submitted that this Court should grant the writ of certiorari requested on the grounds that the decision below is in direct conflict with decisions of other Courts of Appeals, that it is erroneous as a matter of law, that the Court below failed to follow the law of the State of Ohio, as it was obliged to do and the question is an important legal one, that should be reviewed by this Court.

Respectfully submitted,

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APPENDIX A

OPINION OF THE UNITED STATES COURT OF APPEALS, FOR THE SIXTH CIRCUIT

No. 14736

AMERICAN FIDELITY & CASUALTY CO., INC.,
Plaintiff-Appellee,

vs.

INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, ET AL.,
Defendant-Appellants.

Appeal from the United States District Court for the Southern District of Ohio, Western Division.

(Decided and filed October 10, 1962.)

Before: MILLER, Chief Judge, McALLISTER and O'SULLIVAN, Circuit Judges.

MILLER, Chief Judge. This declaratory judgment action was filed by the appellee, American Fidelity & Casualty Company, hereinafter referred to as American Fidelity, as the insurance carrier of Stillpass Transit Company, hereinafter referred to as Transit Company, to have declared the extent of its coverage under a Retroactive National Standard Automobile Liability policy with respect to injuries suffered by an employee of Transit Company during the unloading of a Transit Company tractor-tank-

trailer. It named as defendants; Farm Bureau Cooperative Association, hereinafter referred to as Farm Bureau, on whose premises the accident occurred, John W. Brummett, an employee of Farm Bureau, and the Indemnity Insurance Company of North America, which carried a general liability policy covering Farm Bureau.

The following facts were stipulated. On January 29, 1959, Carl Candler, an employee of Transit Company, drove a tractor-tank-trailer owned by Transit Company, which was loaded with sulfuric acid, to the premises of Farm Bureau in Dayton, Ohio, for the purposes of delivering the sulfuric acid to Farm Bureau. Upon Candler's arrival at the premises of Farm Bureau, John Brummett, who was regularly employed by Farm Bureau, proceeded within the scope of such employment to unload the sulfuric acid from the tank-trailer by application of compressed air to the tank-trailer. After the unloading had commenced a hissing noise was heard by Candler and Brummett. Candler climbed to the top of the tank-trailer to investigate this hissing noise. After climbing up on the tank-trailer and while in the immediate vicinity of the loading hatch, the hatch door opened, allowing sulfuric acid to be thrown upon Candler, resulting in severe injuries to him.

Candler filed a petition against Farm Bureau in the Common Pleas Court of Montgomery County, Ohio, based upon the accident and injuries suffered by him. Brummett was not made a party to this action.

Candler was covered by and received the benefits under the Workmen's Compensation Act of Ohio for the injuries received by him in the accident, such claim being handled on the basis of Candler being an employee of Transit Company.

At the time of the accident Transit Company was insured under a Retroactive National Standard Automobile Liability insurance policy issued by the plaintiff, American

Fidelity. The policy obligated the American Fidelity "to pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury . . . sustained by any person, caused by accident and arising out of the ownership, maintenance or use of the automobile." The policy also provided as follows: "With respect to the insurance for bodily injury liability . . . the unqualified word 'insured' includes the named insured and also includes any person, while using the automobile . . . provided the actual use of the automobile is by the named insured or with his permission." Use of the automobile for the purposes stated included the loading and unloading thereof.

The policy also contained the following exclusions: "This policy does not apply . . . (d) . . . to bodily injury to . . . any employee of the insured while engaged in the employment . . . of the insured. . . . (e) . . . to any obligation for which the insured or any company as his insurer may be held liable, under any workmen's compensation law; . . ."

American Fidelity contended that although Farm Bureau and Brummett, its employee, were insured under the omnibus clause in its policy, there was no liability to Candler, an employee of Transit Company, because of the provision excluding liability for bodily injury to "any employee of the insured." Farm Bureau and Indemnity Insurance Company contended that the exclusion provision was not applicable because Candler, although an employee of the named insured, was not an employee of Farm Bureau, the additional insured, who was the defendant in the action filed by Candler in the state court. As pointed out by this Court in *Kelly* v. *State Automobile Insurance Association*, 288 F. (2) 734, 735-736, C.A. 6th, there is a sharp conflict in the authorities throughout the country on this question. The District Judge ruled that Candler was an "employee of the insured" within the exclusion provision of American

Fidelity's policy and absolved American Fidelity of any insurance coverage of the accident under the policy involved. This appeal followed.

Since this is a diversity case, the law of the State of Ohio is controlling. *Erie R. Co.* v. *Tompkins*, 304 U.S. 64. The parties agree that the Supreme Court of Ohio has not ruled on the issue presented. It is now well settled that if the state's highest court has not declared the applicable law, it is the obligation of the federal court in a diversity case to follow the law as expressed by an intermediate state appellate court, and to do so even if the federal court may think the law as so expressed is unsound in principle or that another rule is preferable, unless it is convinced that the highest court of the state would decide otherwise. *West* v. *A. T. & T. Co.*, 311 U.S. 223, 236-237; *Six Companies* v. *Highway Dist.*, 311 U.S. 180; *Fidelity Trust Co.* v. *Field*, 311 U.S. 169; *Stoner* v. *New York Life Ins. Co.*, 311 U.S. 464, 468; *John Hancock Mutual Life Insurance Co.* v. *Tarrence*, 244 F. (2) 86, 87, C.A. 6th.

The District Judge recognized this rule, but was of the opinion that neither the Ohio Supreme Court nor an intermediate Ohio appellate court had ruled on the question, and that accordingly he was free to exercise his independent judgment in the matter and to adopt the rule which he thought was sound and was supported by the better reasoning. *Kelly* v. *State Automobile Insurance Association*, supra, 288 F. (2) 734, 736, C.A. 6th. He was of the opinion that the better ruling on the question involved was as held by this Court in *Travelers Insurance Co.* v. *Ohio Farmers Indem. Co.*, 262 F. (2) 132, C.A. 6th, affirming 157 F. Supp. 54, and *Kelly* v. *State Automobile Insurance Association*, supra, 288 F. (2) 734, C.A. 6th, in which, under similar policy provisions and similar factual circumstances, coverage of an employee of the named insured had been denied.

Appellants contend that although there is no ruling by the Supreme Court of Ohio on the question involved, there is a ruling by the Eighth Appellate District Court of Appeals for Ohio, which held under a similar factual situation that the exclusion provision of the policy there involved was not applicable and that this ruling is controlling in this case under *West* v. *A. T. & T. Co., supra*, 311 U.S. 223, and other Supreme Court cases hereinabove referred to. That case is styled *American Automobile Insurance Co.* v. *Motorist Mutual Insurance Co., et al.*, and was tried in the Court of Common Pleas for Cuyahoga County, Ohio. The trial judge wrote an opinion upon which the appellants rely, which, however, was unreported. On appeal to the Eighth Appellate District Court of Appeals that Court affirmed the judgment by order without opinion or statement of reasons therefor. Motion to certify to the Ohio Supreme Court was overruled, which, however, under the ruling in *Keesecker* v. *McKelvey Co.*, 141 Ohio State, 162, 169, did not constitute an affirmance of the judgment of the Court of Appeals. See also: *Helleren* v. *Dixon*, 152 Ohio State, 40, 47.

Since the ruling of the Supreme Court in the *West* case, supra, that Court has held in *King* v. *Order of Travelers*, 333 U.S. 153, that the rulings in the *Erie Railroad Co.* case, supra, and the *West* case, supra, do not require a federal court in a diversity case to follow a ruling on state law by a county court of common pleas of a state whose decisions are not reported and, under state practice, are binding only on the parties to the particular case and do not constitute precedents in any other case in that court or any other court of the state. This ruling was based upon the practical administration of the Rules of Decision Act. The Court pointed out that the decisions of the courts of common pleas in South Carolina, the state which was there involved, were not published or digested in any form what-

soever, were filed only in the counties in which the cases were tried, and that litigants could find all the decisions on any given subject only by laboriously searching the judgment rolls in all of South Carolina's forty-six counties, which difficulty in the opinion of the Court was "a matter of great practical significance." It was also pointed out that a federal court adjudicating a matter of state law in a diversity case was in effect only another court of the state, *Guaranty Trust Co.* v. *York*, 326 U.S. 99, 108, and that it would be incongruous indeed to hold the federal court bound by a decision which would not be binding on any state court. Such considerations we think are equally applicable to the ruling of the Common Pleas Court for Cuyahoga County, Ohio, in *American Automobile Insurance Co.* v. *Motorist Mutual Insurance Co.*, supra, and other rulings of common pleas courts in Ohio, relied upon by appellants.

Appellants contend, however, that the affirmance of the judgment in that case by order of the Court of Appeals constitutes a statement of Ohio law by the Court of Appeals which is binding on the District Court under the ruling in the *West* case, supra. We do not agree. The order, without an accompanying opinion or statement of reasons therefor, affirmed the judgment of the Common Pleas Court, but it did not approve the opinion of the trial court or adopt its reasoning. *Victor Talking Mach. Co.* v. *Hoschke*, 188 F. 326, 328, C.A. 2nd; *Rogers* v. *Decker*, 131 N.Y. 490, 493, 30 N.E. 571; *People ex rel. Palmer* v. *Travis*, 223 N.Y. 150, 156, 119 N.E. 437. It is well settled that a correct judgment must be affirmed by an appellate court although the trial court gave a wrong reason for its action. *Ins. Co.* v. *Constantine*, 144 Ohio State. 275, 284; *Riley Co.* v. *Commissioner*, 311 U.S. 55, 59. The order of the Court of Appeals affirming the judgment did not state that it did so "on the opinion of the trial judge" or "for the reasons given by the

trial judge." It does not disclose its reasons for the affirmance. Under the circumstances we do not believe that the case is a rule of decision by an Ohio court "commonly accepted and acted upon by the bar and inferior courts" within the meaning of *West* v. *A. T. & T. Co.*, supra, 311 U.S. 223, at p. 236.

In the absence of controlling Ohio law, we are of the opinion that the District Judge was not in error in following the recent rulings of this Court in the *Travelers Insurance Co.* case and the *Kelly* case, hereinabove referred to.

The judgment is affirmed.

APPENDIX B

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PROCEEDINGS IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Cause Argued and Submitted
June 1, 1962

Before: MILLER, McALLISTER and O'SULLIVAN, Circuit Judges.

This cause is argued by John O. Henry for defendants-appellants and by F. Thomas Green for plaintiff-appellee and is submitted to the Court.

JUDGMENT
(Filed October 10, 1962.)

Appeal from the United States District Court for the Southern District of Ohio.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Ohio, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

APPENDIX C

ORDER DENYING PETITION FOR REHEARING

(Filed November 8, 1962.)

Before: MILLER, McALLISTER and O'SULLIVAN, Circuit Judges.

Appellants' petition for rehearing having been considered by the Court;

IT IS ORDERED that said petition be denied.

s/ SHACKELFORD MILLER, JR.

APPENDIX D

DECISION IN AMERICAN AUTOMOBILE INS. CO. v. MOTORISTS MUTUAL INSURANCE CO., decided June 13, 1960, (Common Pleas Court, Cuyahoga County, Ohio).

(Case No. 708,654)

WILLIAM K. THOMAS, J.:

MEMORANDUM OF OPINION

(June 13, 1960.)

Plaintiff American Automobile Insurance Company (American) seeks a declaratory judgment against defendants Motorists Mutual Insurance Company (Motorists), The Koepke Motor Sales Company (Koepke Company), Harry H. King (King), and Stephen T. Patrick, (Patrick).

A real and substantial controversy exists between American and Motorists as to which company is the primary insurer of King and is required to defend two actions in this Court in which King has been sued for damages. The controversy arises under two public liability policies, one issued by American to King, the other issued to Koepke Company by Motorists; and it grows out of an accident in which King, a prospective purchaser of an automobile owned by Koepke Company, operated the automobile inside the building leased and occupied by Koepke Company in its business of selling and servicing new and used automobiles.

In one case Koepke Company has sued King for damages to its building. In the other case Patrick, a salesman of new and used automobiles for Koepke Company, sues King for personal injuries.

The circumstances leading up to and concerning the accident have been stipulated.

> "Stephen T. Patrick is an employee of The Koepke Motor Sales Company, who works as a salesman of new and used automobiles.
>
> On or about September 20, 1955, Stephen T. Patrick, acting within the scope of his employment for The Koepke Motor Sales Company, demonstrated a 1955 Studebaker automobile to Harry H. King and Mrs. King by driving same with the intention of selling it to them.
>
> The 1955 Studebaker automobile involved was owned by The Koepke Motor Sales Company and displayed dealer's license plates owned by The Koepke Motor Sales Company.
>
> On September 22, 1955, Mr. and Mrs. King returned to The Koepke Motor Sales Company. They were met by Mr. Patrick and Mr. Mitchell, the sales manager. Mr. and Mrs. King were again shown the same automobile. It was inside the service garage.

It was agreed between Mr. Patrick and Mr. King that Mr. King would drive the automobile to his home for the purpose of showing it to his son-in-law.

With the permission of Mr. Patrick and The Koepke Motor Sales Company Mr. and Mrs. King got into the car and were to use the car as set forth above.

Subsequently the motor was started and with Mr. King behind the wheel the car moved forward. Claims of damage have been presented arising from the movement of the car.

At the time of the accident on September 22, 1955, Mr. Patrick was acting within the course and scope of his employment as an employee of The Koepke Motor Sales Company, and Mr. King's use of the car was with the permission and consent of The Koepke Motor Sales Company."

American's obligation to King, under American's policy will be considered first.

American insured King, agreeing to pay on behalf of the insured all sums which the insured shall become legally obligated to pay under Coverage A — Bodily Injury Liability—

". . . as damages because of bodily injury . . . sustained by any person and arising out of the ownership, maintenance or use of any automobile, including the loading and unloading thereof."

Under Coverage C — Property Damage Liability—

". . . as damages because of injury to or destruction of property . . . and arising out of the ownership, maintenance or use of any automobile, including the loading or unloading thereof."

These insuring agreements, it is noted, expressly cover King in his "use of any automobile." Clearly in the absence of any later limitation in the policy these insuring agreements of American are broad enough to insure King in

his accident while operating the Studebaker automobile of Koepke Company.

American directs attention to Paragraph III Definition of Insured. This paragraph states that—

> "... the unqualified word 'insured' includes the named insured ... and, except where specifically stated to the contrary also includes ... (2) with respect to a non-owned automobile, any person or organization legally responsible for the use by the named insured or spouse of an automobile not owned or hired by such person or organization."

This paragraph then limits such extension of coverage by stating that—

> "The insurance under this paragraph with respect to any person or organization other than the named insured or spouse does not apply:
>
> (a) to any person or organization, or to any agent or employee thereof, operating an automobile repair shop, public garage, sales agency ... with respect to any occurrence arising out of the operation thereof ..."

Upon the facts this limitation is inapplicable.

The actions are against King, not the Koepke Company. The foregoing limitation relieves American from any coverage of Koepke Company, a "sales agency," but has no application to King, a customer of Koepke Company, even though the occurrence arose out of the operation of the sales agency.

A later provision of the policy does definitely limit American's general insuring agreements when its insured, King, operates a non-owned automobile.

Paragraph 18 of the Conditions specifies that—

> ". . . the insurance under coverages A and C shall be excess insurance with respect (1) to other insurance against loss arising out of the use of any . . . non-owned automobile."

Modified by this condition the general insuring agreement of American's policy made American the primary insurer of King in connection with the accident as he operated the Studebaker automobile owned by Koepke Company, unless the Motorists policy then insured King.

If the Motorists policy then insured King either as to the personal injury suit of Patrick, or the property damage suit of Koepke Company, with respect to the covered suit Motorists would be the primary insurer of King and American would only be the excess insurer.

It therefore becomes essential to consider and construe the Motorists' policy.

Under an endorsement of its public liability policy Motorists insured Koepke Company with reference to "Auto dealer and repair shop located at 11905 Detroit Avenue, Lakewood, Ohio."

With reference to Coverage A — Bodily Injury Liability, and Coverage B — Property Damage Liability, Motorists agrees to pay on behalf of the insured all sums which the insured shall become obligated to pay by reason of the Liability imposed upon him by law for damages caused by accident and arising out of two hazards. Only the first is presently pertinent.

Hazard 1. involves the ownership, maintenance, occupation or use of the premises designated for the purpose of an automobile dealer or repair shop; and the ownership, maintenance or use of any automobile for any purpose in connection with the above defined operations.

As amended by endorsement the Motorists policy Insuring Agreement IV. *Definition of Insured*, provides that—

> "The Unqualified word 'insured' includes the named insured and also includes . . . (2) any person while using an automobile covered by the policy, . . . provided the actual use of the automobile is by the named insured or with his permission."

The Studebaker automobile was owned by Koepke Company, was covered by the policy, and King's use of the car was with the permission and consent of Koepke Company.

Hence under the general insuring agreements, King, in his operation of the Studebaker at the time of the accident, is an insured under Motorists policy, but it remains to be seen whether any of the policy's exclusions rule out coverage with reference to the two suits which have been brought against King.

As to the suit of Patrick, who at the time of the accident on September 22, 1955, was acting within the course and scope of his employment as an employee of Koepke Company, Motorists relies on Exclusion (c) which reads:

> "EXCLUSIONS
>
> "This policy does not apply:
>
> (c) Under coverage A, to bodily injury to or death of, the named insured, or any employee of the insured while engaged in the employment of the insured, or to any obligation for which the insured or an insurer of the insured may be held liable under any Workmen's Compensation law."

If the word "insured" in Exclusion (c) is synonymous with the term "named insured" then it would necessarily follow, as Motorists contends, that—

> "Motorists policy does not cover King with respect to Patrick's injury, for that injury was to an 'employee (Patrick) of the insured (Koepke) while engaged in the employment of the insured (Koepke).'"

On the other hand, if as American contends, "King is the 'insured'" in the language of Exclusion (c),

> ". . . and since he was using an automobile covered by the policy, then the . . . policy of Motorists . . . gives coverage to King as to the lawsuit filed against him by Stephen T. Patrick for personal injuries, inasmuch as Stephen T. Patrick was not an employee of Harry H. King at the time the accident occurred."

Undoubtedly the key to the problem is the meaning of the word "insured" as used in Exclusion (c).

Examination of the entire clause disclosed that the term "named insured" is used in the first part of the clause. This reads:

> "This policy does not apply: (c) Under coverage A, to bodily injury to or death of, the named insured."

It is the plain intent of this part of Exclusion (c) to prohibit the policy from paying the named insured for his own bodily injury or death.

The clause then proceeds to say (repeating the introduction to make it readable)—

> "This policy does not apply: Under coverage A, to bodily injury to or death of, . . . any employee of the insured while engaged in the employment of the insured, or to any obligation for which the insured may be held liable under any workmen's compensation law."

The choice of the word "insured," without qualification, and its re-use on two further occasions in the balance of the clause, while the term "named insured" is employed in the first part of the clause, reveals a carefully drawn intent to distinguish between the meaning of the term "named insured" and the word "insured."

The conclusion is inescapable that the meaning to be given in Exclusion (c) to the word "insured" is the definition of the word "insured" which is prescribed by Insuring Agreement IV, Definition of Insured as amended by Endorsement. This reads:

> "The unqualified word 'insured' includes the named insured and also includes (1) any partner, employee, director or stockholder thereof while acting within the scope of his duties as such, and any person or organization having a financial interest in the business of the named insured covered by the policy, and (2) any person while using an automobile covered by the policy, and any person or organization legally responsible for the use thereof, provided the actual use of the automobile is by the named insured or with his permission. This policy does not apply (there follow three sub-paragraphs (a), (b), and (c) not presently pertinent) . . ."

From this Definition of Insured, it becomes evident that the word "insured," as used in Exclusion (c) is a word of many meanings. It may be the named insured alone. But also the "insured" may be any partner, employee, director, or stockholder of the named insured.

Or the "insured" may be any person while using an automobile covered by the policy provided the actual use of the automobile is with the permission of the named insured.

The critical language of Exclusion (c) now needs closer inspection. It reads:

> "This policy does not apply: (c) Under coverage A, to bodily injury to or death of . . . any employee of the insured while engaged in the employment of the insured . . ."

This language suggests two opposing constructions of the words "the insured."

Modification of "insured" by the definite article "the" connotes a particular "insured," among the several enumerated in the Definition of Insured found in Insuring Agreement IV as amended by endorsement. Contrariwise the word "insured," if treated as a collective noun under the Definition of Insured, includes the named insured and any additional insured.

This ambiguity is resolved when the words "the insured" are construed in conjunction with the obvious purpose of Exclusion (c), revealed by certain express language in Exclusion (c).

It is noteworthy that employment by "the insured" is not sufficient in itself to exclude the applicability of the policy to any employee of "the insured." Exclusion from coverage for bodily injury or death extends to any employee of "the insured" but only "while engaged in the employment of the insured."

The undoubted purpose of Exclusion (c) is conveyed by the clause "while in the employment of the insured." The purpose is to prevent coverage under the policy from duplicating coverage which the insured as an employer might otherwise have pursuant to employer's liability or workmen's compensation laws. Further manifesting this purpose Exclusion (c) concludes by openly outlawing the policy's applicability—

> ". . . to any obligation for which the insured or an insurer of the insured may be held liable under any workmen's compensation law."

Construed in the light of its manifest purpose, Exclusion (c) bars application of the policy to an insured in an action in which the insured is sued for the bodily injury or death of the insured's employee while engaged in employment for that particular insured.

So construed, Exclusion (c) neither denies nor grants an additional insured coverage under Motorists policy which is not also denied or granted to the named insured. If the named insured is sued by his employee for bodily injury sustained while engaged in his employment Exclusion (c) bars application of the policy to the employee's bodily injury. Likewise if the additional insured is sued by his employee for bodily injury sustained while engaged in his employment Exclusion (c) bars application of the policy to the bodily injury of the employee of the additional insured.

Affirmatively the policy applies when a person, not an employee of the additional insured, sues the additional insured for bodily injury suffered by reason of the negligence of the additional insured, even though the person suing may be the employee of the named insured. This right of action for a third party's negligence an employee enjoys under Ohio law irrespective of the employee's simultaneous right to workmen's compensation. *Truscon Steel Co.* v. *Trumbull Cliffs Furnace Company*, 120 Ohio St. 395. Motorists is presumed to have written and issued its policy with full cognizance of this established principle of Ohio law.

Likewise affirmatively, a named insured sued by an employee of an additional insured, upon the ground of negligence entrustment of an automobile covered by the policy or for some other ground of negligence charged directly to the named insured, is covered by Motorists policy.

The construction which this Court determines must be given to Exclusion (c) of Motorists policy agrees with the

construction of a similar but not identical exclusion clause adjudicated in several recent decisions, *Greaves* v. *Public Service Mutual Insurance Co.*, N.Y.(2d) 120 (1959), 155 N.E.(2d) 390, and *Maryland Casualty Company* v. *New Jersey Manufacturers (Casualty)*, 48 N.J. Super, 314, 137 A(2d) 577 (1958). Also see 24 U. of K.C. Law Review at p. 70.

Particularly persuasive is the premise of the New York Court of Appeals decision following its earlier ruling in *Morgan* v. *Greater N. Y. Taxpayers Mut. Ins. Assn.*, 305 N.Y. 243, 112 N.E. (2d) 273) that:

> "each individual additional insured although not named as an insured in the policy must be treated as if separately covered by the policy and indeed as if he (additional insured) had a separate policy of his own."

and the court's subsequent conclusion:

> "Treating Greaves as a separate insured, the exclusionary clause has no effect as to him since the injured man was not an 'employee of the 'insured' Greaves and the 'insured' Greaves was not liable to the injured man 'under any workmen's compensation law'."

The previous reasoning of this Court has caused it to reach a result not in accord with that arrived at, principally, in *Travelers Insurance Company* v. *Ohio Farmers Indemnity Company*, 262 F. (2d) 132 (6th Cir. 1958), *American Fidelity & Casualty Company* v. *St. Paul Mercury Indemnity Company*, 248 F. (2d) 509 (5th Cir. 1957), and *Birrenkott* v. *McManamay*, 65 S.D. 581, 276 N.W. 725 (1937).

As to Patrick's suit against King it is therefore determined that Exclusion (c) of Motorists policy is not a bar, and it is therefore found and declared that in Patrick's suit against King Motorists is the primary insurer of King, while American is the excess insurer.

Next to be considered is the contention of Motorists, challenged by American, that as to Koepke Company's suit against King, Exclusion (d) of Motorists policy "applies, and because it applies coverage of King is not extended by its policy."

Exclusion (d) reads:

> "This policy does not apply under Coverage B, to injury or destruction of (1) property owned by or rented to the insured . . ."

The policy reflects an intent not to cover property of the named insured. Thus Hazard 3. Collision Damage to Customers Cars in Custody of the Insured states in part:

> "Such property damage liability insurance as is afforded under Hazard 1 or Hazard 2 shall . . . apply with respect to injury to or destruction of automobiles and other property *not owned by or rented to the insured* . . ." (Emphasis added)

Moreover when Exclusion (d) refers to "property owned by or rented to the insured," it can have no reference to property of the additional insured. For coverage of an additional insured under Motorists policy can only arise in connection with an automobile which is covered by the policy and which therefore is not an automobile of the additional insured.

The word "insured," clothed with many meanings by the Definition of Insured contained in Insuring Agreement IV, when interpreted in connection with the entire policy, is deemed to refer solely to the named insured.

Accordingly, as to Koepke's suit against King, American is found and declared to be the primary insurer.

/s/ WILLIAM K. THOMAS
William K. Thomas, Judge

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No. 787

In the

Supreme Court of the United States

October Term, 1962

INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, INC.
AND
JOHN W. BRUMMETT
AND
FARM BUREAU COOPERATIVE ASSOC., INC.,
Petitioners,

vs.

AMERICAN FIDELITY & CASUALTY CO., INC.,
Respondent.

REPLY OF RESPONDENT TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Respondent.

REPLY OF RESPONDENT TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Respondent prays that this petition that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit be denied.

OPINIONS BELOW

The conclusions of law by the United States District Court are reported at 195 F. Supp. 648, (printed Appendix E, *infra*). The subsequent order of the District Court denying petitioners' motion for relief pursuant to Rule

60 (B) is printed in Appendix F, *infra*. The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 308 F. 2d 697 (printed Appendix A).

COUNTER-STATEMENT OF QUESTIONS PRESENTED

(I) Is there a conflict of authority between the several United States Courts of Appeals as to the Ohio law applicable to the issue determined below?

(II) Should there be a review of the decision of the United States Court of Appeals sustaining the decision of the United States District Court in its determination of the law of Ohio applicable to the issue below?

(III) Need there be a review of the decision of the United States Court of Appeals sustaining the decision of the United States District Court in applying the 'conformity doctrine'?

COUNTER-STATEMENT OF THE CASE

Absent the argumentative manner in which it is phrased, with exceptions as noted hereafter, respondent basically accepts the material facts stated by petitioner.

We advisedly refer to petitioner in the singular as the only petitioner with a real interest herein is Indemnity Insurance Company of North America as it fully insured Farm Bureau Cooperative Association, Inc. and John W. Brummett. Farm Bureau and Brummett are, and have been, mere nominal parties subservient to the interests of Indemnity, whose repeated demands and threats of litigation precipitated the bringing of this action for declaratory judgment by respondent.

There has never been any contention that Farm Bureau and Brummett did not come within the definition of an

insured as defined by the omnibus clause of respondent's policy. The essence of this case from its inception has been that the subject exclusionary clauses of respondent's policy exclude coverages to an insured (Farm Bureau and Brummett) in the event of injury to any employee (Candler) of the insured (Stillpass Transit Co.). The United States District Court and the United States Court of Appeals below have unanimously held the subject clauses so stating to be applicable, clear and unambiguous.

REASONS FOR DENYING WRIT

I.

There is no conflict of authority between several United States Courts of Appeals as to the Ohio law applicable to the issue determined below.

The exact issues determined below, involving the clauses of a national standard automobile liability policy with *retrospective provisions*, have been determined by only one other case, state or federal, — *American Fidelity & Casualty Ins. Co.* v. *St. Paul-Mercury Ind., Co.*, 248 F. 2d 509. In that case the United States Court of Appeals for the Fifth Circuit, construing the law of Alabama in absence of any definitive Alabama law, emphatically arrived at the same conclusion as that of the Courts below in this case.

The decisions herein are the only reported decisions of a United States Circuit Court of Appeals (or District Court) construing the law of Ohio as to the merits below.

Ginder v. *Harleysville Mutual Cas. Co.*, 135 F. 2d 215 (CA 3rd), construes the law of Pennsylvania, and *Kaifer* v. *Georgia Cas. Co.*, 67 F. 2d 309 (CA 9th), pertains to the law of California. Neither of these cases cited by petitioner are in any way involved in interpretation or decision

as to the law of Ohio and each construes somewhat similar, but materially different, insurance policies. Neither makes reference to the retrospective provisions as in respondent's policy.

The Ohio cases cited are obviously not applicable to this question and will be the subject of discussion under the third reason for denying writ (infra).

In *Ruhlin* v. *New York Life Ins. Co.*, 304 U.S. 202, 206, this Court has held that conflict among the Circuit Courts, as to questions controlled by state law; is not of itself reason for granting a writ of certiorari, as it "may be merely corollary to a permissible difference of opinion in the State Courts." That circumstance prevails here, as in the other cases cited by petitioner.

There is obviously no conflict shown between decisions or holdings of the several United States Courts of Appeals in construction or interpretation of the law of Ohio, or any other state, applicable to the issues determined below.

II.

The United States Court of Appeals did not err in sustaining the decision of the United States District Court in its determination of the law of Ohio applicable to the issue below.

Petitioner has attempted to precipitate an argument on the merits complete with the identical inapplicable examples presented on the merits in the Courts below. We also here defer discussion of the several decisions of the Common Pleas Courts of Ohio to the argument under the third reason for denying writ (infra).

No contest is made that the Ohio law, as set forth in *Home Ind. Co.* v. *Plymouth*, 146 O.S. 96, is that an exclusion in an insurance contract must be clearly set forth to be operative. Such has been found on the merits of

the issues herein by the Courts below, such having been specifically considered and in each instance the Courts have held the provisions of respondent's policy to be clear and unambiguous with the result that they must be afforded their obvious meaning.

Petitioner cites *Equitable Life Ins. Co.* v. *Gerwick*, 50 O.A. 266, 281, to the effect that conflicting conclusions of courts of numerous jurisdictions as to contract provisions portray ambiguity. The reported case shows that there was in fact no issue before that court of conflicting decisions of numerous jurisdictions. Only the law of Ohio is considered. Such statement was at best a corollary remark, a general expression not pertinent to the issue. The United States Supreme Court has held, in *Cohens* v. *Virginia*, 6 Wheat. 264, 399, 5 Sup. Ct. Law Ed. 264, as early as 1821, that general expressions in an opinion are to be respected but if they go beyond the case, "ought not to control the judgment in a subsequent suit, when the very point is presented for decision."

The only other case found (*American Fid. & Cas. Co., Inc.*, v. *St. Paul-Mercury Ind. Co.*, 248 F. 2d 509), officially reported or not, construing the same *retrospective* automobile liability insurance policy as that in issue here, reached the identical conclusion with that of the Courts below. There have been no conflicting decisions by courts of numerous jurisdictions on the particular issues herein.

III.

The United States Court of Appeals and the United States District Court applied the 'conformity doctrine' in finding the substantive law of Ohio pertaining to this cause as required by WEST v. A. T. & T. CO., 311 U.S. 223.

Is it probable, or possible, that the United States Court of Appeals and the United States District Court have

deliberately ignored determinative law of Ohio on the issues herein in repeated consideration of the identical argument and assertions of petitioner? The answer is "no".

Nothing is suggested or asserted by petitioner here that was not given full consideration by both Courts below.

In such as can be gleaned from the opinions in the three Ohio cases cited in the petition (p. 6, 10, 11), there is no consideration given to the interpretation of a national standard automobile liability policy with *retrospective* provisions. As applicable to consideration of the intent of the contracting parties, this retrospective provision is most material. Its import is to throw back upon its principal insured, Stillpass Transit, any loss that might be incurred or paid on behalf of any insured to Candler, the employee of Stillpass Transit. At the same time, Stillpass Transit, under the Workmens Compensation Statutes of Ohio, bears the additional burden of increased payments to the Ohio Workmens Compensation Fund occasioned by payments from that Fund for Candler's heavy medical expense and disability.

The decision of the Common Pleas Court of Franklin County, Ohio, *Travelers Ins. Co.* v. *Buckeye Union Cas. Co.* (unofficially reported at 81 Ohio L. Abs. 108), to the extent that it construed even somewhat similar provisions of insurance policies, was, at best, dicta relating to a moot question. Prior to reaching any question of the "employee exclusion", that Court first had to determine issues involving "loading – unloading", and in so doing determined the matter. The "employee exclusions" were never considered or mentioned on appeal as shown by the officially reported decision of the Franklin County Court of Appeals, 112 O.App. 386.

The Court of Common Pleas of Columbiana County, Ohio, in *Employers Liability Ins. Co.* v. *Liberty Mutual Ins. Co.* (unofficially reported at 167 N.E. 2d 142) remained

the decision only of that Common Pleas Court, to the extent that it indicates a similarity to the issues in this cause. The content and reasoning of that decision leaves much to be desired. There was no Appellate consideration or decision.

The issues in *American Automobile Ins. Co.* v. *Motorists Mutual Ins. Co.* (not reported, App. D), is even farther afield. The circumstances under which that litigation arose are completely different (App. D, p. 25-26). The decision illustrates that the Court is considering a "garage liability" policy, of which there are many and varied types. No transcript or record is provided. The insurance policies in question are not set out and it is not clear as to whether all of the stipulations and other evidence before the Common Pleas Court is shown. It is apparent from that decision (App. D, p. 28-32) that the Motorists Mutual Ins. Co. policy is of a different nature, with different coverages, different insuring agreements, different exclusions and a substantially different "definition of insured" amended by endorsement and only partially shown. There is no way of ascertaining what other issues, elements of these policies or facts may have been pertinent and influenced the Common Pleas Court in arriving at its decision — or the application of such decision to the issues here.

As appears in the petition (p. 6), that case was taken to the Cuyahoga County Court of Appeals, which affirmed the judgment without reference to the opinion of the lower Court and without opinion of that Appellate Court (not even a dissenting opinion such as was present and considered by Judge Potter Stewart in *Gettins* v. *United States Life Ins. Co.*, 221 F. 2d 782).

The pertinency of each of these cited Ohio Common Pleas decisions, as applicable hereto, was considered in detail, complete with the identical argument outlined in plaintiff's petition, by the United States District Court as

shown in its decision (App. F, p. 15, *infra*), and held inapplicable. The same subject and argument was given full consideration in the United States Court of Appeals, 308 F. 2d 697 (App. B, p. 21) and again held inapplicable.

At the conclusion of its opinion, The United States Court of Appeals stated, "Under the circumstances we do not believe that the case is a rule of decision by an Ohio Court 'commonly accepted and acted upon by the bar and inferior courts' within the meaning of *West* v. *A. T. & T. Co., supra,* 311 U.S. 223, p. 236" (App. B, p. 22).

The situation is not then as described by petitioner. There are no Ohio cases directly on the issues. Three Ohio Common Pleas Courts have construed somewhat similar, but materially different, insurance policies. There was no affirmance of the opinions, or reasons underlying them, by any appellate court in either of the three cases mentioned. Both the United States District Court and the United States Court of Appeals, after fully considering those cases and all other matters submitted, concluded that the Appellate Courts of Ohio would pronounce the law of Ohio on the particular issues in this matter as was emphatically done below.

This is the obligation of the Federal Courts under the doctrine arising from *Erie R. Co.* v. *Tompkins,* 304 U.S. 64. The circumstances here are very nearly identical to the ultimate question determined in *King* v. *Order of Travelers,* 333 U.S. 153, which affirms the decision of the United States Court of Appeals for the Fourth Circuit in rejecting the decision of the Common Pleas Court of South Carolina as determinative precedent of the law of that State. The similarity shown between the complex of the Courts in South Carolina and in Ohio is remarkable. The Common Pleas Courts of both states are Courts of record. South Carolina has 46 Common Pleas Courts (Ohio has 88), with 14 Common Pleas Judges (Ohio has approximately 160).

Despite being denominated Courts of record, the decisions of the Common Pleas Courts of both States are not in any way officially reported or digested. The decision of one Judge of a Common Pleas Court in Ohio is not necessarily considered as precedent by another Judge of the same Common Pleas Court in the same county, with the result that it is impossible to ascertain precedent from such decisions.

In the *King* decision, *supra*, (p. 161) it is stated that a Federal Court, in adjudicating a matter of State law, is in effect only another Court of that State and, "It would be incongruous to hold the Federal Court bound by a decision which would not be binding on any State Court".

This principle is exemplified by cases cited by petitioner (p. 14) where in *Brown* v. *Moore*, 247 F. 2d 711, the Federal Court found that the Common Pleas Court of Pennsylvania had pronounced the same rule of law as would the Supreme Court of Pennsylvania. In *California* v. *Renauld & Co*, 179 F. 2d 605, while adhering to the 'conformity doctrine', the Federal Courts found lower State Court rulings not binding.

In this instance we suggest that the questions involved have been well considered in all aspects, and properly determined by the Courts below, resulting in no necessity for review by this United States Supreme Court.

CONCLUSION

Respondent submits that petitioner fails, in all aspects presented, to justify review of this cause.

There is no conflict between the several United States Courts of Appeals in determining subject Ohio law. The matters decided below pertain to the contractual rights of the several parties with no error demonstrated. The Courts below have fully considered and determined the law of

Ohio in accord with all principles and doctrines pronounced by this United States Supreme Court.

Certainly the question involved is of substance and importance to the parties, but not to others to the extent that this Court is in any way obligated to review.

Respondent therefore has prayed that this Petition for Writ of Certiorari be denied.

Respectfully submitted,

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APPENDIX E

CONCLUSIONS OF LAW AND ORDER, OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

CONCLUSIONS OF LAW

1. This Court has jurisdiction of the parties in this cause.

2. This Court has jurisdiction of the subject matter of this cause. Title 28 U.S.C.A. §§ 1332 and 2201.

3. Since federal jurisdiction in this case is founded on diversity of citizenship, this Court must follow the law of Ohio in deciding this case. Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938).

4. There can be no doubt that the highest state court is the final authority on state law, Erie Railroad Co. v. Tompkins, supra, and where there is no decision of the highest state court, federal courts are bound by decisions of the state's intermediate appellate courts unless there is persuasive evidence that the highest state court would rule otherwise King v. Order of United Commercial Travelers of America, 333 U.S. 153 (1948); Six Companies of California v. Joint Highway District, 311 U.S. 180 (1940); West v. American Telephone and Telegraph Co., 311 U.S. 223 (1940); Stoner v. New York Life Insurance Co., 311 U.S. 464 (1940). The Supreme Court of the United States has also held that a federal court is bound by the decisions of a court of original jurisdiction where that court has state-wide jurisdiction and its standing on the equity side is comparable to that of an intermediate appellate court on the law side. Fidelity Union Trust Co.

v. Field, 311 U.S. 169 (1940). However, a federal court is not bound to follow state trial court decisions where those decisions are binding only upon the parties who are before the court in that particular case and would not constitute a precedent in any other case in that court or in any other court in the state. King v. Order of United Commercial Travelers of America, supra.

5. There are no decisions of the Ohio Supreme Court or of an Ohio Appellate Court on the question of law in this case and since the Courts of Common Pleas of Ohio do not have state wide jurisdiction and are similar to the state trial courts involved in King v. Order of United Commercial Travelers of America, supra, this Court is not bound by the decisions of the Common Pleas Courts of Ohio and may proceed to determine what the Supreme Court of Ohio would probably rule in a similar case. Of course, though not bound by the Common Pleas Courts of Ohio, this Court will attribute some weight to their decisions.

6. The Court has carefully considered the cases of Travelers Insurance Co. v. Buckeye Union Casualty Co., 81 O.L.A. 108 (Common Pleas Court, Franklin County 1959) and Employers Liability Assurance Corp. v. Liberty Mutual Insurance Co., unreported, (Columbiana County Common Pleas Court, Case No. 44982 1949). The first of these cases appears to be in conflict with two Sixth Circuit cases, cited infra at Number 8, on the question of whether there is any ambiguity in the language of the exclusion clause; therefore, that case will not be followed by this Court. As to the second case, the terms and the provisions of the liability insurance policy are not before this Court and therefore the copy of that court's journal entry submitted by counsel is not instructive.

7. Under Ohio law: "Where exceptions, qualifications or exemptions are introduced into an insurance contract, a

general presumption arises to the effect that that which is not clearly excluded from the operation of such contract is included in the operation thereof." The Home Indemnity Co. v. Village of Plymouth, 146 Ohio St. 96 (1945), paragraph two of the syllabus. However, it is well settled that "If the words and terms of the contract are plain and clear, there is neither room nor right for any court to attempt construction." First National Bank of Van Wert v. Houtzer, 96 Ohio St. 404, 406 and 407 (1917).

8. In Travelers Insurance Company v. Ohio Farmers Indemnity Company, 262 F. 2d 132 (6th Cir. 1958) the Sixth Circuit had before it a case strikingly similar to the instant one. The exclusion clause in that case was almost identical to the one in this action. The Court stated at page 133: "There is no ambiguity in the exclusion clause of defendant's policy and no inconsistency is shown between this and other clauses of the instrument. It does not require construction. All that is required is enforcement according to the terms clearly expressed in the instrument."

See also Kelly v. State Automobile Insurance Association, — F. 2d — (6th Cir. 1961) a very recent decision by the Sixth Circuit to the same effect. Compare the case of Travelers Insurance Company v. Peerless Insurance Company, 287 F. 2d 742 (9th Cir. 1961). Note that in the latter case the contention that the exclusion clause operated to eliminate any coverage was abandoned upon appeal.

9. The per curiam opinion in the case of Travelers Insurance Company v. Ohio Farmers Indemnity Company, supra, quotes Judge Parker, who, in a similar case stated: "There can be no question that the purpose was to apply the exclusion to employees of an additional insured as well as to those of the named assured. . . ." Lumber Mutual Casualty Insurance Company of New York v. Stukes, 164 F. 2d 571, 573 (4th Cir. 1947).

10. This Court has carefully examined the plaintiff's policy and concludes that there is no ambiguity in the exclusion clause of said policy and no inconsistency is shown between this and other clauses of the instrument. The exclusion of Candler from coverage under the American Fidelity Casualty Company, Inc. policy is clear.

11. Therefore, for the reason that this Court believes that the Ohio Supreme Court would agree with the Sixth Circuit and conclude that there is no ambiguity in the exclusion clause, and would therefore require the enforcement of the contract according to the terms clearly expressed in the instrument, it is hereby ORDERED, ADJUDGED and DECREED that plaintiff, American Fidelity and Casualty Company, Inc., be absolved of any liability or insurance coverage as to John W. Brummett and/or Farm Bureau Cooperative Association, Inc. and/or Indemnity Insufance Company of America.

In view of the Court's conclusion that there is no coverage under the policy to defendant, the question as to the timeliness of notice to plaintiff becomes moot.

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Judge U. S. District Court

APPENDIX F

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO ON MOTION FOR RELIEF UNDER RULE 60 (B)

This matter is before the Court on the motion of defendants for an Order pursuant to Rule 60 (b) of the

Federal Rules of Civil Procedure for relief from this Court's final judgment on the grounds of excusable neglect, and that it is no longer equitable that the judgment should have prospective application.

Counsel for defendants represent to the Court that they have discovered an unreported case, American Automobile Insurance Co. v. Motorists Mutual Insurance Co., Case No. 708,654, Court of Common Pleas of Cuyahoga County, (1960), which was affirmed without opinion by the Court of Appeals of Cuyahoga County. Counsel argue that since this case was affirmed by an Ohio Appellate Court it would have, if counsel had cited it, controlled the instant action and would have required a judgment contrary to the Court's ruling of June 2, 1961.

As this Court has previously stated, a federal district court is bound by the law as announced by a state's intermediate appellate court unless there is persuasive evidence that the highest state court would rule otherwise. However, in the case which counsel for defendants cite to this Court, the Appellate Court rendered no opinion; it affirmed without opinion. Therefore, there is no way to ascertain the reason for the affirmance; hence, it cannot be said that any law was announced by the Appellate Court's affirmance.

This Court has, however, carefully considered the case cited by counsel but is still of the opinion that if this question were presented to the Ohio Supreme Court it would agree with the reasoning of the Sixth Circuit as set forth in Travelers Insurance Company v. Ohio Farmers Indemnity Company, 262 F. 2d 132 (6th Cir. 1958).

Accordingly, the defendants' motion should be and it hereby is DENIED.

Judge U. S. District Court